United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2169

United States Court of Appeals

For the Second Circuit

ELMER BERNSTEIN, *et al.*,

Plaintiffs-Appellants,

v.

UNIVERSAL PICTURES, INC., *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANTS-APPELLEES

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Preliminary Statement

Defendants-appellees submit this brief in opposition to the appeal by plaintiffs-appellants from that part of the order (637a)* of the Honorable

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* Numbers followed by "a" refer to pages in the Appendix.

Charles L. Brieant, Jr. filed in the United States District Court for the Southern District of New York on July 28, 1974 which dismissed the complaint, pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, for lack of subject matter jurisdiction. Plaintiffs have not appealed from the part of this order which denied their motion (a) to strike as insufficient defendants' affirmative defenses based on the primary and exclusive jurisdiction of the National Labor Relations Board ("NLRB") and the labor exemption to the antitrust laws, and (b) for a preliminary injunction. Judge Brieant's memorandum opinion, reported at 379 F. Supp. 933, is found at 579a; a supplemental memorandum, at 634a.

The Issue Presented

The sole issue for review is whether the District Court was correct in deferring to the NLRB and dismissing the complaint where the facts alleged "arguably" constitute an unfair labor practice.

Statement of the Case

Plaintiffs, 71 composers and lyricists (hereinafter collectively "composers") for motion

picture and television films, who sue on behalf of themselves and all others similarly situated, are all members of the Composers and Lyricists Guild of America ("CLGA")*, as are virtually all members of the plaintiff class (207a, 238a, 581a). CLGA, which was formed in 1954 (134a, 581a) is, in its own words, "a labor union, duly certified by the NLRB to represent composers and lyricists in their employment relationships with producers of theatrical and television motion pictures" (238a, 207a). Defendants include motion picture and television producers who have entered into agreements with CLGA (Ibid.). The motion picture producer defendants (Universal City Studios, Inc., Twentieth Century-Fox Film Corp., Paramount Pictures Corporation, Metro-Goldwyn-Mayer, Inc., Warner Bros.-Seven Arts, Inc. [now Warner Bros. Inc.], Columbia Pictures Industries, Inc. and Walt Disney Productions, Inc.) have entered into three collective bargaining agreements (entitled and hereinafter sometimes referred to as "Minimum Basic Agreements") negotiated on their

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* All the officers of CLGA, including Elmer Bernstein, the President, are plaintiffs (245a).

behalf by the Association of Motion Picture and Television Producers ("AMPTP") (134a), their trade association (584a) which handles industrial relations and collective bargaining negotiations for the producers (366a). The television network defendants (Columbia Broadcasting System, Inc., American Broadcasting Companies, Inc. and National Broadcasting Company, Inc.) at CLGA's insistence (570-71a, 597a), have entered into letter agreements predicated on the Minimum Basic Agreements (572-73a, 576-77a, 603a).*

The complaint (9a et seq.) charges, in

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* As for the six remaining defendants, the complaint was dismissed by stipulation as against AMPTP (Pltfs' Br. p. 2). Neither United Artists Corporation (89a) nor its parent, Transamerica Corporation (72a), is engaged in the production of motion picture or television films; since the allegations of the complaint are directed to "producers" (Pltfs' Br. p. 3), they appear to have been misjoined. The only relationship to this lawsuit of the other three defendants — Gulf & Western Industries, Inc., MCA, Inc. and Kinney Services, Inc. (now Warner Communications, Inc.) — is that they are the corporate parents of producer subsidiaries — Paramount (425a), Universal (381a) and Warner Bros. (18-19a) — which are named as defendants in their own right. Plaintiffs concede that none of these non-producer defendants has had any contract with CLGA (Pltfs' Br. p. 8).

substance, that, in violation of the antitrust laws, "the producers, acting in concert, refuse to contract for the services of composers except upon certain standard terms imposed by the producers ... " (Pltfs' Br. p. 3). The terms referred to relate to the producers' ownership of copyrights of compositions created for motion picture and television sound tracks and, by plaintiffs' own admission, "are found in three successive minimum basic agreements negotiated on behalf of the producers by the AMPTP and on behalf of the composers by the Composers and Lyricists Guild of America, Inc. ... " (Ibid.). In other words, the standard terms allegedly "imposed" on plaintiffs are the very terms of the collective bargaining agreements negotiated by the parties. The complaint seeks damages of at least $300,000,000, and injunctive relief (34a).

Each of the answers, inter alia, sets forth as an affirmative defense: (1) that this action is essentially a labor dispute over which the NLRB has primary and exclusive jurisdiction (39a, 44-46a, 53-54a, 61-62a, 67-70a, 75-76a, 83-85a, 90-92a, 104-06a, 113-15a, 122-23a), and (2) that collective bargaining negotiations and agreements are exempt from the anti-

trust laws by reason of Section 6 of the Clayton Act (15 U.S.C. § 17), Section 20 of the Clayton Act (29 U.S.C. § 52) and Section 1 of the Norris-LaGuardia Act (29 U.S.C. § 101 et seq.) (39a, 46a, 54-55a, 62a, 69a, 77a, 85a, 92a, 106a, 115a, 122a).

The action was commenced on February 7, 1972 (579a). A year and a half later, in July, 1973, plaintiffs moved, pursuant to Rules 12(f), 56 and 65 of the Federal Rules of Civil Procedure, to strike defendants' labor defenses or for summary judgment dismissing these defenses, and for a preliminary injunction which would in effect transfer to plaintiffs the copyrights of music written for defendants (131a). After oral argument, and on the basis of a voluminous record, the District Court denied plaintiffs' motion and, on its motion, pursuant to Rule 12(h)(3), dismissed the complaint for lack of subject matter jurisdiction (637a).

Following a meticulous review of the relevant facts (583-88a), Judge Brieant concluded "it is clear that this action arises out of a labor dispute over which the NLRB has exclusive jurisdiction. Even though the complaint alleges violations of the anti-

trust laws, the issue is essentially a refusal by the defendants to bargain regarding copyright ownership, which, if proven, is an unfair labor practice as defined in § 8(a)(5) of the National Labor Relations Act [29 U.S.C. § 158(a)(5)]" (591a). Finding the factual conduct pleaded in the complaint to be "'arguably' a violation of NLRA § 8(a)(5), and possibly of § 8(a)(3)" (593a), Judge Brieant held, in accordance with the decision of this Court in Buckley v. American Fed. of Television & Radio Artists, 496 F.2d 305 (2d Cir. 1974), that the jurisdiction of the District Court was thereby pre-empted.

As we shall demonstrate in the next section of this brief, dealing with the relevant facts, the record* — which is overwhelmingly documentary, the vast majority of the documents having come from plaintiffs' files (186a) — not only supports, it compels the conclusion reached below. And as we shall demonstrate in our argument, in dismissing the complaint

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* Significantly, pages 9-13 of plaintiffs' brief, which purport to state the "Material Facts", contain exactly one reference to the record. Where record references are omitted, fiction often follows.

the District Court correctly applied the law to the undisputed facts.

The Relevant Facts

A. The Relationship Between the Parties

Plaintiffs do not make at their own risk and expense and then sell to defendants some kind of finished product or "commodity". Indeed, plaintiffs do not even compose "on speculation" (256-57a, 281-82a, 321-22a). On the contrary, defendants hire plaintiffs, either as staff composers (506a) or on a picture-by-picture basis pursuant to individual personal service contracts, to compose appropriate background or incidental music, themes and songs for particular parts of particular films. (Examples of such contracts are found at 140a, 397a, 400a, 434a, 438a, 464a, 480a and 543a.) As these contracts show, defendants pay plaintiffs very substantially for plaintiffs' services. Moreover, since payment is in no way contingent upon defendants' acceptance or approval of the music composed (256-57a, 281-82a, 321-22a), plaintiffs are completely insulated from loss in their work for defendants.

B. Certification of CLGA

Since 1955 plaintiffs* have been represented by CLGA in their employment relationships with defendants. On May 2, 1955, CLGA petitioned the NLRB for recognition as the bargaining representative for a unit composed of "Composers of music and/or words in connection with music" with respect to "Producers of motion pictures", claiming that "A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9(a) and (c) of the act" (202a). On August 19, 1955, after an election held by the NLRB, CLGA was certified as the exclusive representative "of all the employees of the unit ... for the purposes of collective bargaining" with individual motion picture producers and AMPTP as a multi-employer unit (201a). From that time

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* The reference here is not merely to the 71 named plaintiffs but to the entire plaintiff class, for CLGA membership has been a condition of employment of composers since at least 1960 by virtue of the union shop provision contained in the several collective bargaining agreements negotiated by CLGA and AMPTP (251-54a, 275-78a, 315-18a).

on, defendants were compelled to bargain with CLGA (584a).

Since CLGA's certification, CLGA and AMPTP have participated in literally dozens of collective bargaining sessions with respect to wages, hours and other conditions of employment * (184a, 367-68a). Over the years these sessions resulted in three collective bargaining agreements, the Minimum Basic Agreements of 1960** (250-71a), 1965 (273-311a) and 1967 (313-45a), which remained in effect through November 30, 1971 (369a). This lawsuit, as set forth in detail at pages 18-22, below, is the direct result of the breakdown of negotiations on a fourth agreement after an unsuccessful strike by the composers.

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* As Charles Boren, chief negotiator for AMPTP, points out, "the President of the CLGA representing the composer employees who sat across the table from me at the sessions held in the years 1962 through 1970 is the same David Raksin" (372a) who is one of the named plaintiffs herein. Indeed, Mr. Raksin signed the 1967 Minimum Basic Agreement on behalf of CLGA (345a) and another of the named plaintiffs, Jeff Alexander, similarly signed in 1965 (305-11a).

** Erroneously listed in the Table of Contents of the Appendix as "Minimum Basic Agreement of 1969".

All of these collective bargaining agreements were negotiated subsequent to the decision of the NLRB in American Broadcasting Co., 117 N.L.R.B. 13 (1957), to which plaintiffs now turn for "proof" of CLGA's non-union status (Pltfs' Br. pp. 5-6), and the latter two were negotiated subsequent to Alliance of Television Film Producers, Inc., 21-RC-7995 (1963), as well. Moreover, during these years, and despite these decisions, the essential terms of the collective bargaining agreements were imposed on the network defendants by CLGA. As Judge Brieant expressly found:

> "The network defendants ... upon demand by CLGA, have agreed to incorporate in their contracts with CLGA composers certain terms contained in the Minimum Basic Agreements. For example, in response to the usual kind of coercion applied in labor negotiations, here taking the form of a telegram advising that CLGA members would not perform any further services for NBC unless a minimum contract was agreed upon between NBC and CLGA ... NBC entered into an agreement with the union. By letter dated March 19, 1969 ... NBC obligated itself to incorporate in its contracts with CLGA members the substance of provisions of the CLGA-AMPTP agreement setting minimum wage rates, providing for pension fund payments and granting rights arising from copyright ownership.... As NBC correctly points out, if CLGA is not a labor union and its members are not employees, such conduct

> would itself violate the antitrust laws ... " (597-98a)

CBS and ABC are in the identical position as NBC (574-75a, 602-03a).

CLGA's 1955 certification by the NLRB not only stood unchallenged by plaintiffs until the commencement of this action; it was insisted on by them. For the intervening period of some 20 years, CLGA uniformly represented itself to be a union. Thus, CLGA's Bulletin (207a) and its Directory (238a) both characterize CLGA as a "labor union, duly certified by the NLRB ...." Each year since its certification CLGA has filed with the Labor-Management Services Administration of the United States Department of Labor the annual report which the Department requires of such organizations (192a, 240-44a). In addition, from time to time CLGA has filed other reports as a union, with both the Department of Labor (359a, 363a, 374a) and the Department of Employment of the State of California (361a). Plaintiffs' participation in the Motion Picture Health and Welfare Fund and the Motion Picture Industry Pension Plan was made possible by CLGA's representation that it was a union, that there was a "collective bargaining agreement" in effect

with the specified contributing employer, and that "such ... agreement covers the employee unit represented by such ... union ... " (239a).

Further, having obtained a union shop provision in each of the collective bargaining agreements, CLGA was vigilant in enforcing the provision (211-16a). When collective bargaining negotiations broke down, CLGA struck defendants (353-54a) and called on other unions to observe its picket lines (245-46a). Most significantly, on February 2, 1972, after the public announcement that the members of CLGA had authorized its legal counsel to bring the present lawsuit (356a), CLGA informed AMPTP that, despite the expiration of the 1967 Minimum Basic Agreement, CLGA would permit its members to work only for employers who comply with the terms thereof and "All agreements ... must be on file with the CLGA office prior to our approval being given to permit a member starting work ... " (248a). This can only mean that CLGA continued to assert its union status — otherwise its members were combining to enforce an illegal boycott.

C. The Collective Bargaining Agreements

Plaintiffs' claim that the Minimum Basic

Agreements "are not collective bargaining agreements, they are contracts for the sale of a commodity" (Pltfs' Br. p. 30) is, to phrase it politely, frivolous. The 1967 Minimum Basic Agreement, for example, which is not materially different in form from those executed in 1960 and 1965, contains the following types of clause, covering matters which are wholly irrelevant to a commodity contract but plainly material to a labor agreement:

1. A clause which recognizes CLGA as the "exclusive representative for the purpose of collective bargaining of all composers employed under and subject to this agreement" (315a).

2. A union shop requirement based on 30 days following "first employment" in the motion picture industry (315-18a).

3. A provision that a producer may terminate his contract of employment with a composer if the composer fails to remain a member in good standing of CLGA (317-18a).

4. A "no strike" clause (324-26a).

5. A clause specifying minimum scales of compensation for employment (334-36a).

6. A clause dealing with the resolution of jurisdictional labor disputes (341a).

7. A pension plan (342a).

8. A clause providing for contributions to a Health and Welfare Fund (342-43a).

Before the commencement of this action plaintiffs never doubted that the Minimum Basic Agreements were true collective bargaining agreements (211a, 213a, 239a, 347a, 353a, 359a). Nor did they doubt that the Minimum Basic Agreements dealt with employees' services, "the labor of the composers" (Pltfs' Br. p. 31). In 1963 the Executive Director of CLGA wrote one of the defendants "to avoid unnecessary confusion in the future" and afford "clarification of coverage under the Minimum Basic Agreement":

> "It is undisputed that music already in existence at the time of approaching a composer for employment and created for a purpose unrelated to the motion picture in question is not governed by the Guild Agreement. Where, however, a composer or lyricist creates music as a result of solicitation by a Producer, and where it is anticipated that the music will be used in connection with a specific motion picture, whether so used or not, such composer or lyricist is an employee of the Producer and the terms of his employment are within the purview of the Guild Agreement. The form

> of his contract, which may establish certain other legal relationships, e.g., ownership and/or rights, is irrelevant and does not alter the underlying relationship involving the personal services rendered." (208a) (emph. supplied)

Needless to say, the agreements were no less collective bargaining agreements because they fixed minimum terms binding on the employer, but left the composers free to negotiate more favorable terms. (As many composers have. See, e.g., 385-86a, 461-62a, 505a, 527-29a, 535a, 538a.) "This type of labor agreement", as Judge Brieant noted, "is quite commonplace in situations involving 'talent'" (598a).

D. Bargaining Over Copyright

All the participants in the negotiating sessions recognized that in the first instance, as a matter of law,* the copyright to compositions written specifically for a producer belongs to the producer

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* The law to which reference is made is 17 U.S.C. § 26, embodying the "work for hire" doctrine. Plaintiffs' awareness of the producers' right to the copyright is underscored by their extensive but unsuccessful lobbying, through CLGA, to have Congress eliminate this doctrine in the amendment to the Copyright Act which became effective in 1971 (218-34a).

(372a). Nevertheless, the rights embraced by the copyright were the constant subject of collective bargaining (372-73a), and each of the Minimum Basic Agreements provided for a division of these rights. Indeed, just as the minimum wage was raised in each successive agreement, the composer's share in these rights was also increased.

The 1960 agreement guaranteed the composer 50% of the world-wide performing rights (257-58a), uniformly regarded as far and away the most valuable of the rights (350-51a). In 1965 the parties agreed to a division of publication royalties whereby the composer received 50% of the net realized by the domestic publisher on all mechanical reproductions (records and tapes) and a substantial portion of the profits from other publication, such as printed reproductions (piano copies, orchestrations, etc.) (297-98a), and provision was also made for purchase by the composer of music not used by the producer (296a). These provisions were all continued through the term of the 1967 agreement, which in addition expanded the purchase provision (336-38a).

At CLGA's request (427a) a provision was

inserted into the 1965 (281a) and 1967 (321a) collective bargaining agreements as follows:

> "Article 10 Individual Contracts
> This agreement applies to and is incorporated into the provisions of each individual contract between the employer and a composer with respect to services subject to this agreement, and such individual contract shall contain a statement to such effect."

As a consequence, the provisions with respect to performing rights, royalties and unused music — like the wage, health and welfare, pension fund and all the provisions of the collective bargaining agreements — became minimum "standard" terms of the individual contracts. But this is not to say, as do plaintiffs, that they were "standard terms imposed by the producers ... [as] part of a conspiracy ... " (Pltfs' Br. p. 3). The truth is, they were the mutually-agreed result of collective bargaining.

E. Events Culminating in this Litigation

In the course of bargaining sessions held during the Fall of 1971 in an attempt to arrive at a fourth Minimum Basic Agreement (368-69a), CLGA demanded still further concessions on the subject of rights (194a), demanded, in fact, complete "copyright

control" (354a). These bargaining sessions were unsuccessful. On November 15, 1971, CLGA announced that "Negotiations with the AMPTP reached an impasse last Wednesday (10) on the issue of Copyright ownership" and "The Composers and Lyricists Guild of America has voted to strike the Association of Motion Picture and Television Producers, Inc. at the expiration of their present contract, Midnight, November 30, 1971" (353a). At midnight on November 30, 1971, the members of CLGA struck the motion picture and television film industry (369a).

On the same day CLGA filed an unfair labor practice charge against AMPTP* (374a) which alleged, in pertinent part:

> "The above-named employer ... has ... refused to bargain in good faith regarding the terms and conditions of employment for employees in the bargaining unit covering composers of music or lyrics for the Motion Picture and Television Industry. These acts of refusal have also taken the form

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* The charge was verified by Elmer Bernstein, now one of the 71 named plaintiffs. CLGA was represented at the 1971 bargaining sessions by, among others, Theodore W. Kheel, Esq. (353a), who is now the attorney for plaintiffs.

> of discriminatory conduct against employees and future employees in violation of 8(a)(3) of the Act, thereby discouraging membership in the union."

Also on November 30, 1971, AMPTP filed a counter-charge against CLGA (375a) alleging, inter alia, that CLGA had bargained to impasse and was striking over a non-mandatory subject of bargaining, namely, copyright rights, and that the strike had been called without giving notice as required by Section 8(d)(3) of the National Labor Relations Act (29 U.S.C. § 158(d)(3)).

On March 7, 1972, one month after institution of this action, CLGA withdrew its charge (370a). The NLRB dismissed the part of the AMPTP charge relating to the "rights" issue, holding:

> "the contractual demand over which the Guild allegedly bargained to impasse and threatened to strike is a mandatory subject of bargaining within the meaning of Section 8(d) of the Act under the test of Borg-Warner, 356 U.S. 342 (1958), as it involves the relationship between employer and employees, and settles a 'term and condition' of employment, i.e., the total compensation accruing to the composers from their unit work." (378a) (emph. supplied)

CLGA avoided the issuance of a complaint on the § 8(d)(3) portion of AMPTP's complaint by negotiating a settlement agreement with the NLRB (376a) pursuant

to which CLGA promised that in the future it would not "engage in a strike for the purpose of modifying or terminating a collective bargaining contract" (377a) without first giving the requisite statutory notice.

While the unfair labor practice charges were pending before the NLRB, on January 31, 1972, CLGA, at a general membership meeting, "overwhelmingly voted to authorize its legal counsel to file an Anti-Trust Suit against the Association of Motion Picture and Television Producers, ... " (356a) (emph. supplied). To quote CLGA's own press release: "This unprecedented action shifts the composers and lyricists struggle for ownership of all their rights from the labor to the legal arena." (Ibid.). A week later the present action was begun.

What plaintiffs attempted to "shift" was the very dispute between the producers and the composers which arose at the bargaining table and was, quite properly, submitted to the NLRB by both sides. But the law is plain that, as the District Court held, a "labor union, for so it has represented itself to be for the past 20 years, cannot remove jurisdiction from the National Labor Relations Board and confer it upon

this Court by the simple expedients of a membership vote and the commencement by its then President of this class action litigation couched in antitrust terms, followed by withdrawal of its unfair labor practice charges" (588a).

Argument

POINT I

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT ON THE GROUND THAT PRIMARY AND EXCLUSIVE JURISDICTION IS VESTED IN THE NATIONAL LABOR RELATIONS BOARD

Ever since the decision of the Supreme Court in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), it has been the rule that where litigation arises from activity which is even "arguably" subject to the jurisdiction of the NLRB, "the federal courts must defer to the exclusive competence of the National Labor Relations Board ... " (Id. at 245). This rule has been repeatedly affirmed by the Supreme Court (e.g., Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 [1971]; Iron Workers v. Perko, 373 U.S. 701 [1963]; Marine Engineers Beneficial Ass'n v. Interlake

Steamship Co., 370 U.S. 173 [1962]), and, of course, followed by this Court. E.g., Buckley v. American Fed. of Television & Radio Artists, 496 F.2d 305 (2d Cir. 1974); Aetna Freight Lines, Inc. v. Clayton, 228 F.2d 384 (2d Cir. 1955), cert. denied, 351 U.S. 950 (1956).

The cases cited above make it abundantly clear that the averment of conduct which, if proven, would amount to an unfair labor practice, renders the controversy cognizable only by the NLRB and requires dismissal of the complaint. It is, of course, not necessary that the complaint expressly allege an unfair labor practice. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, supra at 292. As this Court stated recently in Buckley:

> "Although appellees' complaints do not explicitly allege violations of §§ 8(a)(3) and 8(b)(2), they do aver the commission of acts which we find are 'arguable' unfair labor practices under those sections of the NLRA. When unfair labor practices are alleged 'the federal courts must defer to the exclusive competence of the National Labor Relations Board'. San Diego Building Trades Council v. Garmon ... [359 U.S. 236, 245 (1959)]; accord, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 ... (1971)." (496 F.2d 305, 312)

The District Court concluded that the "issue is essentially a refusal by the defendants to bargain regarding copyright ownership, which, if proven, is an unfair labor practice ... " (591a). In the light of the history of this litigation, and particularly in view of the actual filing of unfair labor practices on the issue, no other conclusion is possible. Under these circumstances, the above authorities mandate dismissal.

Plaintiffs urge that the District Court erred in holding without a trial that they were employees rather than independent contractors. However, plaintiffs present contention that they are and always have been independent contractors is negated by the record facts discussed above and is inconsistent with 20 years of collective bargaining in which plaintiffs have enjoyed the benefits of the employee status which they asserted throughout this period.* Quite obviously,

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* As Judge Brieant observed (597-98a, 635a), if in fact plaintiffs were independent contractors their conduct over the past 20 years would unquestionably constitute a violation of the antitrust laws. See, e.g., United States v. National Ass'n of Real Estate Boards, [cont'd. on next page]

plaintiffs advance this contention for the sole purpose of indirectly attacking the status of CLGA as a labor organization in order to deprive the NLRB of jurisdiction.

The District Court properly found that plaintiffs were estopped from denying their employee status and that of the CLGA as a labor organization:

> "In view of the undisputed history of the underlying disagreement, the plaintiffs' claim that they are now and always have been independent contractors, rather than union members or employees is regarded as mere sophistry, and an exercise in shifting nomenclature contrived in order to sustain this lawsuit." (588a)

This finding was based on extensive evidence (see pp. 8-22, above), and was certainly warranted by elementary principles of estoppel — judicial estoppel, and equitable estoppel as well.

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* [cont'd. from preceding page] 339 U.S. 485 (1950); American Medical Ass'n v. United States, 317 U.S. 519 (1943); Gulf Coast Shrimpers and Oystermans Ass'n v. United States, 236 F.2d 658 (5th Cir.), cert. denied, 352 U.S. 927 (1956).

In Roth v. McAllister Bros., Inc., 316 F.2d 143 (2d Cir. 1963), the general rule with respect to judicial estoppel was succinctly stated:

> "A party having assumed a certain position in a legal proceeding and having succeeded in maintaining that position ... may not thereafter assume a contrary position in a subsequent proceeding elsewhere simply because its interests have changed, especially if the change be to the prejudice of the party who has acquiesced in the position formerly taken." (Id. at 145)

See, to the same effect: Jamison v. Garrett, 205 F.2d 15 (D.C. Cir. 1953); Chicago, S.S. & S.B.R.R. v. Fleming, 109 F.2d 419 (7th Cir. 1940).

In Roth v. McAllister this Court held that the defendant, which had successfully defended itself in a workman's compensation proceeding on the ground that the claimant was a seaman employed by it whose sole remedy was under the Jones Act, could not deny in a subsequent action commenced in the District Court either that the plaintiff was a seaman or that he had been employed by the defendant. It is clear, therefore, that the rule is not limited to "legal proceedings" in courts but extends to proceedings before administrative agencies. See also Rosasco v. Brownell,

163 F. Supp. 45, 53 (E.D.N.Y. 1958). It follows that plaintiffs herein, having obtained certification of CLGA as their exclusive bargaining agent by representing to the NLRB that they were employees, cannot now deny their status as employees or CLGA's as a labor organization.

"[A]n existing certification must be honored until lawfully rescinded ... " NLRB v. Warrensburg Board & Paper Corp., 340 F.2d 920, 923 (2d Cir. 1965); accord: NLRB v. White Construction & Eng. Co., 204 F.2d 950, 953 (5th Cir. 1953); Valley Mould & Iron Corp. v. NLRB, 116 F.2d 760, 765 (7th Cir.), cert. denied, 313 U.S. 590 (1941). For nearly 20 years CLGA's certification was honored and through collective bargaining and the resulting Minimum Basic Agreements* plaintiffs secured benefits and obtained

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* The Minimum Basic Agreements here involved dealt with terms and conditions of employment, as the NLRB found (p. 20), and thus were true collective bargaining agreements as opposed to the "Basic Agreement" involved in Ring v. Spina, 148 F.2d 647 (2d 1945), relied on by plaintiffs (Pltfs' Br. pp. 26, 30), which unilaterally fixed terms for the licensing of works which were already in existence.

concessions from defendants, which would have been unattainable had plaintiffs bargained individually.

Having induced defendants to deal with them as employees to their benefit and defendants' detriment, plaintiffs cannot now do a complete about-face and assert that all that time they were really independent contractors in disguise. As was stated in Dickerson v. Colgrove, 100 U.S. 578, 580 (1880):

> "The estoppel here relied on is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

See, to the same effect: In re Gravure Paper & Board Corp., 234 F.2d 928 (3d Cir. 1956); Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948); Yat[illegible] v. American Republics Corp., 163 F.2d 178 (10th Cir. 1947).

Furthermore, quite apart from estoppel, the District Court's refusal to hold a trial on the employee-independent contractor issue was entirely proper. The employee-independent contractor issue is a spurious issue. The real issue is whether plain-

tiffs were members of a labor union and dealt collectively with defendants. Plaintiffs' status is relevant only insofar as it is an element in determining whether CLGA is a labor organization. However, a finding by the District Court that CLGA was such an organization was not a prerequisite to dismissal. The District Court merely had to find that CLGA might be a labor organization (and thus the activities complained of are "arguably" unfair labor practices). The Supreme Court has so held without equivocation. Iron Workers v. Perko, supra; Marine Engineers Beneficial Ass'n v. Interlake Steamship Co., supra. As the Court ruled in Marine Engineers:

> "the task of determining what is a 'labor organization' in the context of § 8(b) must in any doubtful case begin with the National Labor Relations Board, and ... the only workable way to assure this result is for the courts to concede that a union is a 'labor organization' for § 8(b) purposes whenever a reasonably arguable case is made to that effect." (emph. supplied) (Id. at 182)

Such a case has surely been made here.

POINT II

THE TERMS OF THE MINIMUM BASIC AGREEMENTS ARE IMMUNE FROM ATTACK UNDER THE ANTITRUST LAWS

It is settled law that, absent an agreement to the contrary, a copyright belongs to "the person at whose instance and expense the work is done", regardless of whether the actual author is an employee or an independent contractor. Brattleboro Publishing Co. v. Winmill Publishing Corp., 369 F.2d 565, 567 (2d Cir. 1966); Picture Music, Inc. v. Bourne, Inc., 457 F.2d 1213 (2d Cir. 1972), cert. denied, 409 U.S. 997 (1973). Without a doubt, in the instant case defendants are the persons "at whose instance and expense" the music in issue was written, and it is they who are the owners of the copyrights.

Nevertheless, defendants have bargained in good faith with plaintiffs over the copyright issue and, as set forth at pages 16-18, above, have made substantial concessions.* Moreover, as recently as

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* The duty to bargain in good faith does not require a party to yield or make concessions. NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958); NLRB v. American National Ins. Co., 343 U.S. 395, 404 (1952).

June, 1972, the NLRB ruled that the copyright in issue here is a mandatory subject of collective bargaining. (Id. at pages 19-20.) The result of this mandatory collective bargaining is embodied in the terms of the three Minimum Basic Agreements.

The whole thrust of the complaint is that these terms violate the Sherman Act. Under the authorities discussed below, however, collective bargaining agreements are immune from such attack by virtue of the labor exemption to the antitrust laws. Although Judge Brieant's decision was not predicated upon the affirmative defense based on the labor exemption, we submit that it furnishes an alternative ground for dismissing the complaint which this Court is free to adopt. Dandridge v. Williams, 397 U.S. 471, 475 (1970); Lum Wan v. Esperdy, 321 F.2d 123 (2d Cir. 1963).

The starting point is Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965). In Jewel Tea, a disaffected employer sought to invalidate under the Sherman Act a marketing hours provision which had been agreed to by an association of food retailers and a number of local unions representing

butchers. The Supreme Court held that the agreement was exempt from the antitrust laws. Mr. Justice White, speaking for three of the justices, emphasized that classification as a mandatory subject of collective bargaining "weighs heavily in favor of antitrust exemption for agreements on these subjects" (Id. at 689). Mr. Justice Goldberg, also speaking for three, took the position that:

> "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." (Id. at 710)

Moreover, as he commented in a footnote: "decisions of the Labor Board as to what constitutes a subject of mandatory bargaining are, of course, very significant in determination of the applicability of the labor exemption". (Ibid.)

His discussion suggests that as between employers and employees engaged in collective bargaining the antitrust laws ought not have any application whatsoever to the determination of terms and conditions of employment. As he observed:

> "The National Labor Relations Act ... declares it to be the policy of the United States to promote the establishment of wages, hours, and other terms

> and conditions of employment by free collective bargaining between employers and unions. The Act further provides that both employers and unions must bargain about such mandatory subjects of bargaining. This national scheme would be virtually destroyed by the imposition of Sherman Act criminal and civil penalties upon employers and unions engaged in such collective bargaining. To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme." (Id. at 711-12) (emph. supplied)

"Nor", the opinion continues, "can it be seriously argued that multi-employer bargaining ... introduces an illegal element ... " (Id. at 713). See NLRB v. Truck Drivers Union, 353 U.S. 87, 95 (1957).

Then, as if he foresaw the situation now before this Court, Mr. Justice Goldberg wrote:

> "It would seem the height of unfairness so to penalize employers for the discharge of their statutory duty to bargain on wages, hours, and other terms and conditions of employment, which duty, this Court has held, requires the employer to enter into a signed contract with the union embodying the collective bargaining terms agreed upon. See H.J. Heinz Co. v. Labor Board, 311 U.S. 514, 85 L ed 309, 61 S Ct 320." (381 U.S. 676, 730) (emph. supplied)

The applicable recent decisions in the lower

courts have adhered to the philosophy expressed in Jewel Tea. Thus, in Cordova v. Bache & Co., 321 F. Supp. 600 (S.D.N.Y. 1970), Judge Mansfield stated that:

> "a joint collective bargaining agreement with the union ... [is] immune from the antitrust laws. The exemption granted to such agreements extends to joint-employer action reasonably related or incident to them." (Id. at 607)

And in Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840 (3d Cir. 1974), the Court of Appeals held:

> "We reject Scooper Dooper's contention that the labor exemption is unavailable to employers. Such a proposition would undermine the vitality of the exemption by discouraging bargaining on the part of management. To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption. See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 462, 499 (E.D.Pa. 1972).
>
> "We similarly reject any contention that the issues faced by Judge Frankel and this Court differ merely because the party claiming the exemption herein (Kraftco) differs from the parties (the unions) which claimed same in the prior litigation. The labor exemption to the antitrust laws applies to the bargaining agreement, the product of negotiations between unions and management. See Local Union No. 189,

> Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 689, 85 S.Ct. 1596, 1601, 14 L.Ed. 2d 640 (1965) ('Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects.'). Judge Frankel ruled, in effect, that the bargaining provision quoted at the outset of this opinion gives rise to the labor exemption. Kraftco is asserting no more in the instant case." (Id. at 847, n. 14)

After nearly two decades of collective bargaining, it is clear that here, as in Scooper Dooper, the challenged agreement "gives rise to the labor exemption".

Conclusion

For the foregoing reasons, the order of the District Court dismissing the complaint should be affirmed.

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December 27, 1974

Respectfully submitted,

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